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No. 82-

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LONG ISLAND UNIVERSITY,

Petitioner,

-v.-

DIANA L. SPIRT, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTION PRESENTED

Does a retirement plan which provides for equal contributions by and on behalf of similarly situated men and women but pays lower periodic benefits to women under certain retirement options due to the use of separate male and female mortality tables discriminate on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2000e17 (1976 & Supp. IV 1980))?

PARTIES TO THE PROCEEDING

In addition to the petitioner and respondent listed in the caption, the following are also respondents herein: Teachers Insurance and Annuity Association ("TIAA") (defendant); College Retirement Equities Fund ("CREF") (defendant); Albert B. Lewis in his capacity as Superintendent of Insurance of the State of New York ("Superintendent Lewis") (supplemental defendant); the Equal Employment Opportunity Commission ("EEOC") (intervenor); and the American Association of University Professors ("AAUP") (intervenor).

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Petitioner Long Island University ("LIU") respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 29, 1982, and that said writ encompass the question presented herein. Teachers' Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") filed a Petition for Writ of Certiorari on November 9, 1982 (No. 82-791).*

In this petition for a writ of certiorari, LIU raises only one of the questions presented for certiorari by TIAA-CREF. There-

* TIAA-CREF also filed a Motion for Expedited Consideration of Petition for Certiorari which was denied on November 15, 1982. LIU authorized TIAA-CREF to state in their Motion for Expedited Consideration that LIU is in favor of a grant of certiorari in this case, that it agrees with TIAA-CREF's position that the *Spirit* case should be heard at the same time as *Norris v. Arizona Governing Committee for Tax Deferred Annuities*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52), and that it wishes to submit its views on certiorari to the Court. (Petitioner TIAA-CREF's Motion for Expedited Consideration at 3.) LIU submits its views on certiorari to the Court herein.

fore, LIU petitions for a writ of certiorari separately from TIAA-CREF, rather than joining in their petition or waiving the right to petition.*

For the reasons stated herein (*see infra* pp. 13-15), should certiorari be granted, petitioner LIU respectfully requests that this case be set for argument on the same date argument is heard in *Norris* and that an expedited briefing schedule be adopted, if necessary.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 29 Fair Empl. Prac. Cas. (BNA) 1599 and 30 Empl. Prac. Dec. (CCH) ¶133,072, appears in the separately bound Appendix filed with the TIAA-CREF Petition (No. 82-791)(1a).** In addition to its Order and Judgment, dated September 17, 1979 (134a), the district court issued five opinions in this case (all of which appear in the TIAA-CREF Appendix): (1) January 23, 1976 (not officially reported)(28a); (2) July 1, 1976 (reported at 416 F. Supp. 1019)(32a); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298)(44a); and (5) March 19, 1982 (on limited remand) (reported at 93 F.R.D. 627)(82a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was filed on September 29, 1982. This petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1976).

* If TIAA-CREF's petition is granted, LIU will address all the issues approved by the Court for the writ.

** Citations herein to material printed in the TIAA-CREF Appendix appear as "a."

STATUTE INVOLVED

Involved herein is:

(1) Section 703(a)(1) and (2) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) and (2) (1976), which provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Proceedings Below

Respondent Diana L. Spirt ("Spirt"), a tenured professor at LIU, commenced this action in 1974 against TIAA-CREF alleging that the TIAA-CREF retirement system discriminated against women. In an opinion filed on July 1, 1976, the district court denied Spirt's motion for class certification, denied the joint motion of TIAA-CREF for partial summary judgment and granted TIAA-CREF's motion to join LIU as a defendant (84a).

Thereafter, Spirt and TIAA-CREF filed cross motions for summary judgment. LIU adopted a position of neutrality and submitted its rights and interests to the protection of the court

(45a). The district court denied summary judgment to Spirt on her claims under the Fourteenth Amendment and the Civil Rights Acts, 42 U.S.C. §§ 1983 and 1985(3) (1976) (70a, 74a), but granted summary judgment on her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976) ("Title VII") (66a). Relying on *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the district court found that the use of separate male and female mortality tables which resulted in the payment of lower periodic benefits to women under certain retirement options violates Title VII. *Id.* It enjoined CREF from using separate male and female tables with respect to the payment of benefits after May 1, 1980 (75a), enjoined LIU from contributing or requiring its employees to contribute to a retirement system that used separate male and female mortality tables, *id.*, and ruled that TIAA was exempt from Title VII under the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015 (1976) ("McCarran-Ferguson Act") (53a).

All the parties filed notices of appeal from the district court's decision and Judgment. Subsequently, the Court of Appeals for the Second Circuit, pursuant to a stipulation among the parties, ordered that the appeals be withdrawn from active consideration so that the district court could supervise the settlement negotiations which the parties were then conducting (84a). In the course of the settlement negotiations, TIAA-CREF proposed to replace the separate male and female mortality tables with tables that eliminated any sex-based differentiation in the payment of benefits with respect to future contributions to the TIAA-CREF retirement plans. As a result, TIAA-CREF submitted a set of merged-gender mortality tables to Superintendent Lewis, which he approved (Unisex I) (84a-85a). However, the EEOC objected to Unisex I on the grounds that it violated both Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1976)(85a). TIAA-CREF then submitted a revised set of merged-gender mortality tables (Unisex II) which were approved by EEOC. Superintendent Lewis rejected Unisex II. *Id.* TIAA-CREF then developed an entirely new plan with respect to future contributions also based on merged gender

tables (Unisex III) which Superintendent Lewis approved, but which the EEOC did not approve. *Id.*

In February, 1981, the district court granted Spirt leave to file a supplemental complaint naming Superintendent Lewis as a defendant. *Id.* Spirt moved for summary judgment against Superintendent Lewis, and TIAA-CREF, *inter alia*, moved to amend the judgment (86a). Both of these motions were denied (131a). Thereafter, the parties prosecuted their appeals to the Second Circuit on an expedited basis. On September 29, 1982, the Second Circuit affirmed the district court's holding as to CREF and LIU, reversed the district court's holding that TIAA was exempt from Title VII under the McCarran-Ferguson Act and enjoined TIAA from paying benefits after May 1, 1980 on the basis of separate male and female mortality tables.

Facts

Diana L. Spirt is presently employed by LIU as a tenured professor. She has not retired (JA172, JA175).^{*} LIU is a private institution of higher education and employs a faculty which includes both sexes (JA172). As noted above, plaintiff Spirt originally sued only TIAA and CREF. LIU was brought in as a party by motion of TIAA-CREF.

LIU has contributed to the TIAA-CREF retirement system an equal percentage of the salary of all participating employees regardless of sex (JA175). LIU's contributions for similarly situated males and females have been exactly the same.

TIAA is a not-for-profit institution organized in 1918 by the Carnegie Foundation for the Advancement of Teaching (JA172). It was created solely to serve institutions similar to LIU by relieving them of the burden of establishing and administering their own retirement programs. TIAA functions as a service organization, providing retirement and insurance plans for edu-

^{*} The facts referred to herein, taken mainly from the Stipulation of Facts dated April 21, 1977, are contained in the Joint Appendix filed below. Citations herein to the Joint Appendix appear as "JA..."

cational institutions and their staff members. *Id.* Eligibility is limited to employees of colleges, universities, independent schools and certain other not-for-profit institutions that are engaged primarily in education or research. *Id.* CREF is a not-for-profit corporation created in 1952 as a companion corporation to TIAA and has the same limited eligibility as TIAA (JA172). TIAA and CREF have the same management and act, in effect, as one organization. Participants may allocate funds between them as they choose (JA536).

Over 85% of all private, four-year colleges and universities and over 40% of all public colleges and universities have adopted retirement plans managed by TIAA-CREF (JA173). Over 700,000 persons presently have contracts with TIAA-CREF and over 3,400 institutions have TIAA-CREF retirement plans. (Petitioner TIAA-CREF's Petition for Writ of Certiorari at 4.)

In their booklet, "CREF Units at Work," TIAA-CREF describe their central role in providing retirement benefits to professors and staff of educational institutions:

For more than half a century, *TIAA has been an integral part of higher education*, providing fully funded, fully vested retirement benefits that allow staff members to move from one institution to another without impairing the ownership and accumulation of their retirement annuity funds. (JA536) (emphasis added).

LIU adopted the TIAA-CREF system in 1955 (JA174). There is no written contract between TIAA-CREF and LIU. *Id.* Each participating employee of LIU individually contracts directly with TIAA and/or CREF. *Id.* LIU makes contributions on behalf of such employees and the employees make contributions themselves (JA173-74). Spirt is one of approximately 800 employees of LIU (500 males and 300 females) who have annuity contracts or certificates with TIAA-CREF (JA173). As noted above, with respect to those employees, LIU contributes an equal percentage of each participating employee's salary, regardless of his or her sex (JA175).

Contributions made by or on behalf of an employee of LIU vest immediately (JA175). Each employee has an individual account in which contributions accumulate. *Id.* These accumulations are exactly the same for similarly situated men and women until retirement (JA175, JA178). An important feature of the TIAA-CREF system is its portability (JA176). Once an employee has a vested account, such employee maintains that account whether or not he or she continues in the employ of LIU. *Id.* If the employee goes to another participating university, the combination of university and individual contributions can continue. *Id.* If the employee leaves the teaching profession, the employee can continue voluntary payments into his or her account. *Id.*

On retirement, participants must choose from the various options TIAA-CREF offer (JA177-78, JA255-56). A participant selects a particular option and enters into a contract with TIAA-CREF (JA176-77). LIU and other educational institutions have no control whatsoever over the terms of these contracts (JA174, JA254), the setting of rates or the determination of benefits to be paid (JA180-83). At retirement, all similarly situated employees of LIU, male or female, have identical accumulations in their individual accounts with TIAA-CREF (JA178).

When an employee retires, he or she is not entitled to a lump sum payment of his or her entire accumulated account (JA176), but must choose from the various options TIAA-CREF offer (JA177-78, JA255-56). Lump sum withdrawal is limited to 10%. *Id.* All benefits, other than the 10% lump sum payment, are paid out depending on the mortality tables in use at the time of retirement (JA182). These mortality tables are revised from time to time to reflect the mortality experience of the TIAA-CREF annuitants (JA180-82). At the time of the Stipulation of Facts, TIAA-CREF used separate male and female mortality tables, sometimes referred to as sex-distinct mortality tables, which the court below found was a violation of Title VII. TIAA-CREF stipulated that it would be technically possible to construct a mortality table which would combine mortality statistics relating to both males and females (JA185). The mortality tables used for Unisex I, II and III consist of such combined mortality statistics.

Two general types of options which rely on mortality tables are available to a participant on retirement: (1) a joint or survivor option providing income for the life of the participant and another person designated by the participant, usually a spouse, and (2) a single life option providing income for the participant alone (JA177-78).

According to TIAA-CREF, 60% of the participating male employees choose one of three joint options. TIAA-CREF state that under the two most frequently selected joint options the benefits are equal for similarly situated male and female annuitants. (Affidavit of William C. Greenough, Chairman and Chief Executive Officer of TIAA-CREF, sworn to August 19, 1975, ¶¶16, 17(c), JA256, 257.) The difference between the amounts paid to men and to women in the third type of joint option is small. (Stipulation of Facts ¶30, JA183.) Thus, with respect to 60% of the men there is practically no difference in the periodic payments made to them and those made to similarly situated women who choose the same joint option (JA 183, JA255-57). This is so because the benefit rate is based upon the combined survival probabilities of each couple, irrespective of whether the first annuitant is male or female (JA255-57). In effect, a unisex mortality table is presently being used with respect to these joint options.

Under the single life option, the periodic benefits payable to men and women on retirement are different. However, TIAA-CREF officials have stated that under their current system, "annuities are paid under the single life option at a *slightly* higher periodic rate to men than to women of the same age. . . ." (Affidavit of Thomas G. Walsh, Actuary of TIAA-CREF, sworn to June 8, 1977, ¶9, JA364) (emphasis added). Thus, according to the affidavits of TIAA-CREF officials, presently there is little or no difference in the periodic payments to men and women under the joint or survivor options, which are chosen by 60% of the men, and the difference between men and women under the current single life options is described as slight. The relief ordered by the Second Circuit in *Spirit* will not seriously affect either the periodic benefits payable to men or the financial stability of TIAA-CREF.

REASONS FOR GRANTING WRIT

I. There Is A Direct Conflict Among The Circuits Regarding The Validity Of The Use Of Separate Male And Female Mortality Tables In Computing Unequal Periodic Benefit Payments To Similarly Situated Men And Women In Retirement Plans Covered By Title VII

Two courts of appeals have recently come to diametrically opposite conclusions concerning TIAA-CREF's use of separate male and female mortality tables under Title VII. Considering almost identical retirement plans in light of this Court's decision in *Manhart*, the Second Circuit in *Spirt* (1a) held the use of separate male and female mortality tables a violation of Title VII, while the Sixth Circuit in *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, Nos. 79-1658, 79-1670, 79-1671 (6th Cir. Oct. 14, 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794)(136a) found no violation of Title VII. Consequently, the Second Circuit has enjoined TIAA-CREF from making any payments after May 1, 1980 based on separate male and female mortality tables and has enjoined LIU from contributing or requiring its employees to contribute to any plan which uses such tables, but Wayne State University and the other educational institutions which have adopted the TIAA-CREF system are not so enjoined.

The First Circuit, in *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), appears to agree with the Second Circuit that under *Manhart* the TIAA-CREF retirement plan violates Title VII. 589 F. 2d at 1144.

Thus, the Second Circuit applied *Manhart* to the TIAA-CREF plan and found it in violation of Title VII. The Sixth Circuit applied *Manhart* to the TIAA-CREF retirement plan and found no violation of Title VII. The First Circuit applied *Manhart* to the TIAA-CREF plan and ruled that the plan appeared to violate Title VII but to determine liability the Court wanted further development of the record than existed on a motion to dismiss.

Furthermore, the Ninth Circuit, applying *Manhart*, held that the use of separate male and female mortality tables is a violation

of Title VII in different kinds of retirement and deferred compensation plans not involving TIAA-CREF. *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52); *Retired Public Employees' Association of California v. California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. Aug. 14, 1982) (No. 82-262). The reasoning of the Ninth Circuit is in accord with the reasoning of the Second Circuit in *Spirt* and conflicts with the reasoning of the Sixth Circuit in *Peters*.

The fundamental issue in these cases is whether a retirement or deferred compensation plan which provides for equal contributions from similarly situated men and women but pays lower periodic benefits to women based on separate male and female mortality tables violates Title VII. *Manhart* involved a plan in which similarly situated men and women contributed unequal amounts and received equal periodic payments. The First, Second and Ninth Circuits concluded that the reasoning in *Manhart* applies with equal force to cases in which equal contributions yield unequal benefit payments. The Sixth Circuit considered the distinction significant and limited the holding in *Manhart* to cases where the women's take-home pay was less than that of the men (143a).

The First, Second and Ninth Circuits held that the use of separate male and female mortality tables discriminates against women as individuals and that such discrimination could not be overcome by the argument of actuarial equality; *viz.* because women as a group live longer than men as a group, they receive equal value even though they are paid lower periodic benefits than men. These courts viewed the use of separate male and female mortality tables as a difference in treatment based solely on sex and hence facially discriminatory. Therefore, the requisite intent was shown and the plaintiffs did not have to prove improper motivation.* The Sixth Circuit noted that to substan-

* Although the district court in *Spirt* ruled that Spirt did not have to prove that TIAA-CREF's facially discriminatory plan was intentionally discriminatory and stated that "business necessity" does not "insulate [a defendant] from what

tiate a claim of employment discrimination under Title VII, a plaintiff must show either disparate treatment or disparate impact (140a). The court concluded that plaintiffs failed to prove disparate treatment because plaintiffs failed to show improper motivation on the part of Wayne State University (141a). The Sixth Circuit also concluded that plaintiffs failed to prove a disparate impact, holding that separate male and female mortality tables did not discriminate against women in violation of Title VII because such tables were based on longevity rather than sex and because women received actuarially equal value as men even though women were paid lower periodic benefits (142a, 144a).

If the Sixth Circuit's application of *Manhart* to the use of separate male and female mortality tables in connection with equal contribution—unequal payment plans is correct, then the injunction imposed on LIU and TIAA-CREF in the *Spirit* case should be lifted.

If the Second, Ninth and First Circuits' application of *Manhart* is correct, then LIU would urge this Court to affirm the Second Circuit's decision and Judgment in its entirety. The subsidiary questions decided in *Spirit* by the Second Circuit are not questions which this Court usually considers.

Specifically, the Second Circuit's ruling on the application of the McCarran-Ferguson Act appears to be eminently correct and is not in conflict with any other circuit. The Sixth Circuit never reached this issue.

The Second Circuit's affirmance of the district court's finding of fact that TIAA-CREF was an employer for the purposes of Title VII also was correct. While the Sixth Circuit came to an opposite conclusion (139a), that finding was not necessary for the decision in the *Peters* case. Having found that the use of separate male and female mortality tables was not a violation of Title VII, the Sixth Circuit was not required to reach the em-

would otherwise be a Title VII violation," the court went on to find that the "sex distinctions drawn by TIAA-CREF are [not] 'reasonably necessary to the normal operation' of their plans." (64a) (citations omitted).

ployee-employer issue any more than the McCarran-Ferguson issue. In any event, such a question of fact is not usually considered by this Court on a writ of certiorari.

Similarly, the relief ordered by the district court and affirmed and modified by the Second Circuit is entrusted to the discretion of those courts, and that discretion was not abused. The relief ordered by the Second Circuit is consistent with the language of *Manhart* (24a). As shown herein, *supra* p. 8, the present differences between payments to men and payments to women under the TIAA-CREF system are not large. Thus, the relief granted by the district court and modified by the Court of Appeals, equalizing periodic payments, will not have a substantial let alone a devastating effect on TIAA-CREF, rendering the relief ordered an abuse of discretion. The district court carefully avoided awarding retroactive payments or other relief that would increase costs and thereby jeopardize the financial stability of TIAA-CREF plans (75a). Compliance with the district court's order would require recalculations of benefits disbursed from funds already in TIAA-CREF's control (76a) and would not affect the total anticipated obligations of the TIAA-CREF funds (24a). Furthermore, TIAA-CREF stipulated that it was technically possible to construct unisex mortality tables, and, in fact, TIAA-CREF did so with respect to Unisex I, II and III. Superintendent Lewis has approved Unisex I and III, showing that New York State law does not proscribe the use of such tables.

Nor will the Second Circuit's decision and Judgment in this case revolutionize the private insurance industry. There are no claims in this case that private independent insurance companies serving the general public are covered by Title VII. This case involves a unique organization, TIAA-CREF, which is an "integral part of higher education." (*See supra* p. 6.) TIAA-CREF was created and exists to provide retirement benefits to the teachers and staff of educational and research institutions, thereby relieving such institutions from the burden of administering retirement plans. *Only* teachers and staff of such institutions are eligible for TIAA-CREF retirement contracts.

Nevertheless, the issue presented in this petition is of national importance. Over 3,400 institutions and over 700,000

participants are involved in TIAA-CREF retirement plans throughout the country. There are a substantial number of cases pending which involve the TIAA-CREF retirement system itself, and other cases involve the application of *Manhart* to retirement plans which use sex distinct mortality tables and are covered by Title VII.*

In view of the conflict among the circuits concerning the application of *Manhart*, and the substantial number of pending cases which involve TIAA-CREF's system, the question posed in this petition should be resolved by this Court so that the prevailing confusion and uncertainty respecting retirement plans covered by Title VII may be removed.

II. A Decision In *Norris* Will Not Resolve The Conflict Among The Circuits.

The questions presented in *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, *supra*, do not require a resolution of the fundamental question posed by this petition concerning the validity of separate male and female mortality tables. The petition in *Norris* focusses on the open market exception of *Manhart* and on Tenth Amendment immunities, issues which simply do not exist in this case.

In *Norris*, the State of Arizona made available to its employees a deferred compensation plan under which deferred compensation could be paid out on retirement in one of three ways: (1) a lump sum payment on retirement; (2) periodic payments for a fixed number of months; and (3) life annuities of a type offered to the general public by one of three private, independent insurance companies. Only the third option was challenged and held to be a violation of Title VII since all such annuities were based on separate male and female mortality tables. Arizona contends that its deferred compensation plan falls within

* In their Petition for Writ of Certiorari in this case, TIAA-CREF state that ten cases are pending against them in district courts, and note seven cases in addition to the cases mentioned herein which have applied the holding in *Manhart*. (Petitioner TIAA-CREF's Petition for Writ of Certiorari at 13 & n.5.)

the open market exception pronounced in *Manhart* because the plan's participants could elect to receive their deferred compensation in a lump sum and purchase the largest benefit available in the market place.

Another question raised in *Norris* concerns whether the relief ordered by the Ninth Circuit violates the Tenth Amendment, since the Arizona legislature explicitly provided that no contribution was to be made by the state to the deferred compensation plan.

If this Court determines in *Norris* that the open market exception applies, or that the Tenth Amendment bars the relief ordered, it need not reach the issue posed by this petition.

Furthermore, the deferred compensation plan in *Norris* is so different from the TIAA-CREF plan involved herein and in *Peters* that a decision in *Norris* would not resolve the conflict between the Second and Sixth Circuits.

Unlike the participants in the deferred compensation plan in *Norris*, TIAA-CREF participants do not have the option of receiving their accumulated accounts in one lump sum payment on retirement and purchasing the largest benefit available in the open market. TIAA-CREF participants are required to choose from among the options offered by TIAA-CREF. Unlike *Norris*, TIAA-CREF is not a private, independent insurance company offering annuities to the general public. TIAA-CREF was created solely to relieve educational and research institutions from the burden of administering retirement plans, and eligibility is restricted to the teachers and staff of such institutions. Thus, the open market exception has no application to *Spirt* or *Peters*.

Since this Court has granted certiorari in *Norris*, and at least will consider the open market exception pronounced in *Manhart*, it would seem appropriate to hear *Spirt* at the same time* so that all the issues regarding the application of *Manhart* can be heard and resolved expeditiously. Then, plan administrators

* A petition for certiorari has been filed in *Peters* (No. 82-794), and petitioner there has also requested to be heard at the same time as *Norris*.

can operate in compliance with Title VII, and plan participants can feel secure with respect to their prospective retirement benefits.

CONCLUSION

For the reasons stated above, LIU prays that a writ of certiorari on the question presented herein be granted and that the case be scheduled for argument on the same date argument is heard in *Norris*, pursuant to an expedited briefing schedule, if required.

Dated: November 30, 1982

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